IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 12TH JUNE 2007 / 22ND JYAISHTA 1929

SA.No. 698 of 1995()

AGAINST THE JUDGMENT AND DECREE DT.31.3.1995 IN AS.83/1991 of ADDL. DISTRICT COURT, PARAVUR.
OS.30/1988 of MUNSIFF COURT, PERUMBAVOOR

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APPELLANT: (RESPONDENT- DEFENDANT)

YACOB, SON OF VARKEY, NJODIYANPARAMBIL,
ALLAPRA SOUTH, VENGOLA VILLAGE,
KUNNATHUNAD TALUK.

BY ADV. SRI.DINESH R.SHENOY
SRI.VPK.PANICKER
SRI.B.JAYASANKAR

RESPONDENT: (APPELLANT- PLAINTIFF)

M.C.OUSEPH, SON OF CHACKO, MUKKANANCHERY
PATTAL BHAGAM, IRINGOLE,
PERUMBAVOOR VILLAGE,
KUNNATHUNAD TALUK.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 12/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.698 OF 1995

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Dated this the 12th day of June, 2007

JUDGMENT

Defendant in O.S.No.30/1988 on the file of Munsiff Court, Perumbavoor is the appellant. Plaintiff in the suit is the respondent. Respondent instituted the suit seeking a decree for realisation of Rs.13762/- due under Ext.A1 bond executed by the appellant to the respondent. It was contended that appellant borrowed the amount on 18.1.1985 and executed Ext.A1 promissory note agreeing to repay the same before 30.5.1985 and inspite of demand, the amount was not paid and therefore respondent is entitled to the decree for realisation of the amount with future interest at 6% per annum. Appellant filed the written statement denying execution of Ext.A1 and contending that he did not borrow the amount and is not liable to pay any amount. It was contended that respondent was conducting a grocery shop in

the building belonging to Srambikudy Mathai and a part of that shop was sub-let by respondent to the appellant and while so appellant borrowed Rs.10,000/- from respondent to buy a car and at that time respondent obtained signed blank papers from the appellant and as he did not borrow Rs.13762/- on 18.1.1985 as claimed and respondent is not entitled to the decree sought for. Learned Munsiff framed necessary issues. On the side of the respondent, he was examined as PW1 and a witness was examined as PW2. Exts.A1 to A5 were marked. On the side of the appellant he was examined as DW1. Three witnesses were also examined. Learned Munsiff on the evidence found that Ext.A1 is not a promissory note but a bond and though appellant denied its execution, the handwriting and signature seen in Ext.A1 with the evidence prove that it was executed by the appellant. Learned Munsiff also found that there is no evidence to prove that consideration shown in Ext.A1 was paid by the respondent or received by

the appellant. It is therefore held that respondent is not entitled to the decree sought for. The suit was dismissed.

2. Respondent challenged the decree and judgment before Additional District Court, North Parur in A.S.83/1991. The learned Additional District Judge on reappreciation of evidence held that as the genuineness of Ext.A1 was upheld by the trial court and appellant did not challenge that finding of the trial court by filing a Cross Objection, the genuineness of Ext.A1 cannot be challenged in the appeal. The learned Additional District Judge reappreciated the evidence and found that evidence of PW1 corroborated by PW2 establish that appellant borrowed the amount and executed Ext.A1 and therefore granted a decree. It is challenged in the Second Appeal.

3. The Second Appeal was admitted formulating the following substantial questions of law.

1) When the suit was dismissed whether the defendant in an appeal filed against the judgment

by the plaintiff is not entitled to challenge the finding against him without filing a Cross Objection and if so whether first Appellate Court was correct in holding that appellant is not entitled to challenge the genuineness or execution of Ext.A1 before the first Appellate Court.

2) Whether appreciation of evidence by the first Appellate Court was legal when the trial court had disbelieved the evidence of Pws.1 and 2 ?

4. Learned counsel appearing for the appellant and respondent were heard.

5. The first Appellate Court holding that appellant/defendant did not challenge the finding of the trial court on the question of genuineness of Ext.A1 held that on his failure to file a Cross Objection, appellant is not entitled to challenge that finding. Rule 22 of Order XL1 of Code of Civil Procedure enables a respondent, though he may not have appealed from any part of the decree to not only to support the decree but also to state that the finding against him by the court below in

respect of any issue ought to have been in his favour. Though sub rule (1) of Rule 22 enables the appellant to file a Cross Objection against any such finding, the fact that respondent did not file a Cross Objection will not disentitle him to exercise his right provided under Rule 22. Rule 22 enables a respondent who succeeded before the trial court not only to support the decree and judgment in the appeal filed by the appellant but also to contend that the finding against him by the court below in the judgment ought to have been in his favour.

6. Rule 22 of Order XL1 reads:-

> "Upon hearing, respondent may object to decree as if he had preferred separate appeal-(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree (but may also state that the

> finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross-objection)to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

In the light of the specific provisions in Rule 22, the finding of first Appellate Court that appellant herein is not entitled to challenge the genuineness or execution of Ext.A1 promissory note without filing a Cross Objection in the first

appeal is against the provisions of law and unsustainable. That substantial question of law is answered in favour of the appellant.

7. Though in the suit respondent did not specifically plead that Ext.A1 is a promissory note prior to the institution of the suit respondent admittedly sent a notice demanding the amount covered under Ext.A1. Ext.A2 is the reply to that notice sent by the appellant. The copy of the original notice sent by the respondent was produced by the respondent along with the plaint and though it was not marked, it was available before the trial court for verification. Learned Munsiff on going through that lawyer notice as well as Ext.A2 reply, held that respondent had claimed that Ext.A1 is a promissory note. When respondent was examined as PW1 and Ext.A1 was sought to be marked at the time of chief examination the admissibility of Ext.A1 for insufficiency of the stamp was disputed and thereafter learned Munsiff passed the order holding that Ext.A1 is not a promissory note but a

bond. Ext.A1 does not contain a promise to pay the amount on demand, which is mandatory for a promissory note. Therefore the courts below rightly found that Ext.A1 is not a promissory note but a bond. But while entering that finding trial court did not enter a finding on the genuineness of Ext.A1 or that Ext.A1 was executed by appellant. That finding of the first appellate court is clearly erroneous.

8. In the written statement appellant specifically denied the execution of Ext.A1. When respondent in the plaint alleged that Ext.A1 was written by the appellant in his own hand, appellant in his written statement pleaded that he did not execute Ext.A1 or write Ext.A1. When PW1 was examined, even the signature in Ext.A1 was disputed. The learned Munsiff as well as the learned Additional District Judge on comparison of the signature and the handwriting of the appellant taken from open court which was available for comparison held that the signature seen in Ext.A1

is that of the appellant. Though learned Munsiff disbelieved the evidence of PW2, learned District Judge without considering the sufficiency or the justification of the reasons shown by the trial court for disbelieving PW2, held that evidence of PW2 corroborates the evidence of PW1. On the evidence of PW1, it was held that execution and passing of consideration was proved. When the trial court on appreciation of the very same evidence held that passing of consideration as shown in Ext.A1 was not proved, the question is how far the finding of the first Appellate Court is justified and legal?

9. Though appellant in the written statement pleaded that he borrowed Rs.10,000/- from respondent and at that time signed blank papers were obtained by respondent from the appellant, both the courts disbelieved the case. But the fact that appellant failed to establish that case will not automatically lead to a conclusion that appellant had borrowed Rs.13762/- on 18.1.1985 as

claimed by the respondent. That fact is to be specifically proved.

10. When appellant specifically denied execution of Ext.A1 and disputed the case of the respondent that Ext.A1 was written in the handwriting of the appellant, first Appellate Court was not justified in interfering with the findings of the trial court especially when the trial court had the advantage to note and appellant the demeanour of the witnesses examined. Respondent did not serve any interrogatory on the appellant as to whether he admits the handwriting and signature seen in Ext.A1. Respondent also did not sent Ext.A1 to a handwriting expert to obtain a report on the identity of the handwriting and signature seen in Ext.A1. Ext.A1 shows that the executant had signed Ext.A1 in the presence of a witness Baby Peter. He was not examined. Though PW2 was examined and Pws 1 and 2 deposed that PW2 was present at the time of execution of Ext.A1 and borrowal of the amount by appellant, Ext.A1 does

not show that PW2 was present at the time of the transaction or execution of Ext.A1. The trial court had given cogent reasons to disbelieve the evidence of PW2. Unfortunately that was not considered by the first Appellate Court. Without appreciating the evidence of PW2, it was held that evidence of PW2 corroborates the evidence of PW1. That finding of the first Appellate Court is unsustainable.

11. When PW2 is admittedly once an employee of PW1 and his evidence also establish that he was one of the co-defendants in a suit instituted by the landlord against respondent and Ext.A1 does not support the case of the respondent that PW2 was present at the time of the transaction or execution of Ext.A1, first Appellate Court should not have interfered with the appreciation of evidence of PW2 by the trial court which had occasion to appreciate the demeanour of the witness. Evidence of PW2 is not helpful either to prove the execution or passing of the consideration.

12. What remains is only the evidence of PW1. Learned Munsiff appreciated the inherent defect in Ext.A1. Ext.A1 shows that immediately after the body of the document, the witness Baby Peter had signed and thereafter the executant had signed. Normally it is improbable. When this fact is appreciated in the background of the case that the amount borrowed was Rs.13,762/- as rightly found by the trial court, it is improbable. In the circumstances of the case, it cannot be believed. Though there is no impediment for granting a loan of Rs.13,762/-, in the normal course, unless appellant had some pressing necessity for that much amount, the amount would normally be a round figure. It was sought to be justified by respondent deposing that appellant wanted Rs.15,000/- as loan and at that time in his shop respondent had only Rs.13,762/- which was granted as loan. There is no such pleading. The evidence of PW1 shows that the average income from his shop is only Rs.1000/-. If that be the case, respondent

would not have with him that much amount as shown in Ext.A1 to grant a loan to the appellant. When the learned Munsuff appreciated the evidence in the proper perspective and found that evidence of PW1 and the transaction alleged by him is improbable, first Appellate Court should not have interfered with that finding. As rightly found by the trial court, when Ext.A1 is only a bond and the presumption provided under section 118 of the Negotiable Instruments Act is not available, apart from execution respondent has to prove that consideration was also passed. There is no acceptable evidence to prove that appellant had borrowed the amount as claimed by the respondent. On going through through the records and appreciating the evidence in the background of the facts disclosed, appreciation of evidence by the first Appellate Court was not proper. It should not have interfered with the findings of the trial court.

Appeal is allowed. The decree and judgment

granted by the first Appellate Court is set aside and the judgment of the trial court is restored and the suit stands dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006